DOCUMENT RESUME

ED 378 112 SO 024 656

TITLE	Statement of Facts for 1975 City-Wide Mock Trial Competitions. Georgia Floyd, Individually and as Parent and Next Friend of Minor, Nelson Floyd v. Fix-It Home Remodeling, Inc. and Sam Baldwin.
INSTITUTION	Georgetown Univ., Washington, DC. Law Center.; National Inst. for Citizen Education in the Law, Washington, DC.
PUB DATE	75
NOTE	36p.; For related items, see SO 024 657-674. Some pages may not reproduce clearly.
AVAILABLE FROM	Social Studies School Service, Dept. A3, P.O. Box 802, Culver City, CA 90232-0802.
PUB TYPE	Guides - Classroom Use - Instructional Materials (For Learner) (051) -- Guides - Classroom Use - Teaching Guides (For Teacher) (052)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Citizenship Education; *Civil Law; Court Litigation; Instructional Materials; *Law Related Education; Secondary Education; Social Studies
IDENTIFIERS	*Mock Trials; *Street Law

ABSTRACT

Prepared by the District of Columbia Street Law Project for its annual city-wide mock trial competition, this instructional handout provides material for a civil trial over a claim for damages. During an argument, a friend pushed Nelson Floyd against the railing of a porch. Falling onto the concrete below, Nelson was injured with a broken shin bone, broken ribs, a concussion, cuts, bruises, and a black eye. Georgia Floyd, Nelson's grandmother, blames Fix-It Home Remodeling, the company that built the porch, and is suing them for the medical expenses, the cost of the porch, and punitive damages. Georgia Floyd claims the company employed poorly skilled carpenters and used poor quality materials. Fix-It Home Remodeling claims that it fulfilled the terms of the contract and that the accident was her grandson's fault. The handout clarifies the laws and explains the legal precedents. As evidence, the handout provides the contract; the bill; lists of the medical expenses; an advertisement from the company; and witness statements from the plaintiff, her grandson, the carpenters, a neighbor, and the company president. Through participation in mock trials and analysis of the activity, students gain an insider's perspective on courtroom procedure and a basic understanding of the legal mechanism through which society resolves its disputes. Mock trials develop critical analysis, questioning and listening skills, and skills in preparing and organizing materials. (JD)

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ED 378 112

STATEMENT OF FACTS FOR 1975 CITY-WIDE MOCK TRIAL COMPETITIONS

Georgia Floyd, Individually and as parent and next friend of minor, Nelson Floyd

v.

Fix-It Home Remodeling, Inc. and Sam Baldwin

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STATEMENT OF FACTS FOR 1975 CITY-WIDE MOCK TRIAL COMPETITIONS

Georgia Floyd, Individually and as parent and next friend of minor, Nelson Floyd v. Fix-It Home Remodeling, Inc. and Sam Baldwin

On April 22, 1974, Mrs. Georgia Floyd signed a contract with the Fix-It Home Remodeling Company to have a new back porch and steps built onto her house. This contract called for the construction of a porch for the price of $2,500.00.

Mrs. Floyd had called Fix-It Home Remodeling on the phone after seeing an advertisement in the newspaper. Mr. Sam Baldwin, President of Fix-It home Remodeling Company then visited Mrs. Floyd, a contract was signed and a deposit of $680.00 put down. There is a dispute as to exactly what oral promises Mr. Baldwin made to Mrs. Floyd regarding this contract.

On August 29th construction began with Ms. Shelly Smith, a union master carpenter working on the porch for Fix-It Home Remodeling Company. Two days later Ms. Smith was replaced by Mr. Lawrence Warsley who completed the job after two more days of work.

On September 9, 1974, an argument took place on the new back porch between Nelson Floyd, Mrs. Floyd's grandson, and a friend, Phil Russell. During this argument, Nelson was knocked or pushed up against the railing of the porch and he fell to the cement patio below. Nelson was taken to the hospital where it was determined that he had a broken shin bone, broken ribs, a concussion, cuts, bruises, and a black eye.

Mrs. Floyd has retained a lawyer who has filed suit for a total of $14,140.00 in the Street Law Superior Court asking for:

(1) Return of $2,500.00 which has been paid for the porch.

(2) Compensatory damages for hospital bills totalling $1,640.00.

(3) $10,000.00 in punitive damages to punish Baldwin for his actions.

Mrs. Floyd alleges that:

(1) She has been the victim of fraud in that Baldwin made certain misrepresentations to her and never intended to do a decent job.

(2) That Baldwin has broken the contract by using poorly skilled carpenters and poor quality materials, resulting in a porch of less than ordinary quality.

(3) That Nelson was injured as a result of the poor quality of workmanship performed, and that as his grandmother and guardian she paid for resulting medical bills.

(4) That Baldwin and his company should be punished for perpetrating this type of fraud on Mrs. Floyd and the public.

Baldwin denies all of Mrs. Floyd's charges, and claims that he has fulfilled all the terms of their contract. In addition, he claims that Mrs. Floyd's claims of faulty workmanship are based on Mrs. Floyd's discriminatory views regarding women, and that any injuries which occurred were the fault of Mrs. Floyd's grandson and not Baldwin's responsibility.

A date has been set for the Trial which will be held in Georgetown Law Center's Moot Courtroom, 600 New Jersey Avenue, N.W.

Plaintiff's Witnesses	Defendant's Witnesses
Georgia Floyd	Sam Baldwin
Fred Mason (Carpenter)	Lawrence Warsley (Carpenter)
Nelson Floyd	Myrna Black (Neighbor)

Statement of
WITNESS FOR PROSECUTION

Georgia Floyd
1274 Harrison Street, N.W.

I am 75 years old and have lived in my present house for 20 years. My husband, has been in a nursing home since last year. One Sunday, April 21st, I saw this advertisement in the Sunday T.V. magazine for quick inexpensive deluxe porches. I called the number and arranged for a visit by a Mr. Baldwin the next day.

This Baldwin fella showed up and was a real slick talker. He said that he could make me a beautiful porch for less than $2500.00. He also said that he hired only master carpenters and workmen and that the proch would take only two weeks to build from the time I signed the contract. Well, I signed right then and paid him the $680 deposit.

I had hoped the porch would be finished for the summer but no one came for a month. I called a number of times the fix-it company but no-one answered or they took a message or I was referred to another number where another company, something like Home Repairs Unlimited, answered.

Finally after four months a woman showed up, a Miss. Smith. Whoever heard of a woman carpenter? I called Baldwin but he said she was good and not to worry.

After two days she left and that Warsley showed up. Warsley looked like he was drunk all the time and I found out from a friend that Warsley is a regular at the Canal Bar and Grill up on Georgia Avenue.

Warsley supposedly finished the porch after 2 more days on Aug. 28th. I thought that was awful quick but Baldwin came to look at it and said it was fine. I thought it felt kind of unsteady. Baldwin went with me to my bank and had me withdraw the ~~$1200~~ 1420 in cash to pay him. I had already paid him $1080 before.

About two weeks later on September 9th my grandson, Nelson, and his friend, Phil were playing around on the back porch. Nelson pushed up against the railing and fell to the cement below. The wood was obviously cheap and poorly constructed. Nelson only weighs 100 pounds. Nelson suffered awful pain and had to be in the hospital for three weeks. I'm going broke paying these bills.

Statement of Georgia Floyd - Continued

After the accident, I tried to call Baldwin to get him to pay for Nelson's injuries, but his old phone was disconnected. I finally chased him down through the D.C. Office of Consumer Affairs who had a number of complaints about his new company, Beautiful Porches, Inc.

GEORGIA FLOYD, being first duly sworn, upon her oath deposes and says:

That she is a witness for the defendant in the action of Georgia Floyd v. Fix-it Remodeling Home, Inc. and Sam Baldwin; that she has read the matters stated therein are true of her own knowledge, except as to those matters stated therein upon information and belief, and as to those matters she believes them to be true; and

FURTHER, that such contents were given freely and with her knowledge and consent in the presence and with the assistance of Counsel.

/s/ Georgia Floyd

SUBSCRIBED AND SWORN to before me this 16th day of April. 19 75.

Notary Public

My Commission expires:

Statement of
WITNESS FOR PROSECUTION

Nelson Floyd - Grandson

My name is Nelson Floyd, I live with my grandparents, Mr. and Mrs. Floyd, at 1274 Harrison Street, N.W., Washington, D.C. I am 17 years old and attend Coolidge High School.

I was out on the porch talking to my friend -- Phil Russell about my car. He started bad-mouthing the work I had done on it. You see, I bought this old '63 Fairlane from this lady I know for about $50. It was really messed up. So I worked on the body, gave it a good paint job, and a new engine. The whole bit. Of course, I'm real careful with it. I don't lend it to anyone.

Well, Phil came over that day to see if he could use my car. I told him no way. He hit me in my face. Called me some names. Said I was ungrateful for the help he gave me getting it all fixed. So he picked up some parts for me a couple of times. But that was all. Anyway, he jumped up in my face all big and bad. I pushed him off. Then he pushed me but not very hard. I fell against the porch railing and the next thing I knew, I was lying on the ground in awful pain. I thought my leg was broken and I found out later that it was.

When he saw what happened, Phil came right down to help. But I was too hurt to move. He called the ambulance for me.

The doctor in the hospital emergency room said I had a broken left tibia (skin bone), three broken ribs, a concussion and cuts and bruises. I had bruise marks all over my left side for about a month after I fell into that crummy porch.

That porch never did seem right to me. It always shook when anybody walked across it or up and down the stairs. They had some woman who didn't look very strong and then a drunk build it. No wonder it fell down.

I was in the hospital for three weeks. When I went home they changed the cast and the new one stayed on for about 6 weeks. I missed 2 months of school. It sure was painful. It still aches now. I can't stand too long. Plus the hospital bills are still coming in to be paid. I think that man Baldwin took my grandmother for a ride.

That was a cheap porch for too much money.

NELSON FLOYD, being first duly sworn, upon his oath deposes and says:

That he is a witness for Georgia Floyd in the action of Georgia Floyd v. Fix It Home Remodeling; that he has read the foregoing statement and knows the contents thereof; that the matters stated therein are true of his own knowledge, except as to those matters stated therein upon information and belief, and as to those matters he believes them to be true; and

FURTHER, that such contents were given freely and with his knowledge and consent in the presence and with the assistance of counsel.

_____

/s/ Nelson Floyd

SUBSCRIBED AND SWORN to before me this _____ day of _____ 19 _____.

_____

Notary Public

My commission expires:

Statement of
WITNESS FOR PROSECUTION

Mr. Fred Mason
511 Harrison St., N.W.
Washington, D.C.

My name is Fred Mason. I live at 511 Harrison Street, N.W. I am a master carpenter by trade. I have been in the business for over forty years. A master carpenter is one who can lay out the frame work of a house and do all woodwork in the building of the house. He should know basically about heating and electricity.

I began work as an apprentice, right out of high school in 1940. When the war came along I was able to continue my apprenticeship in the Navy, building construction frames for U-Boats. I was in the Navy for four years. Then I worked for A D C Construction Company in its wood shop. There I apprenticed for a six month period with several different masters -- door hinges, stair cutter, floor layer, frame builder, decorative work, bannisters, etc.

When I had completed all this, about 10 - 12 years, I moved on to a smaller company where I had a chance to do more of what I had learned at A D C. At Columbia Construction, I supervised a work crew of about 10 men in all carpentry phases of home construction from framework to decorative detail. I stayed with them about 15 years and had been promoted from crew supervisor to site supervisor by the time I left.

I then opened my own business. I have 10 crews consisting of 10 men each. Except for special delicate work, I don't employ women because they don't have the strength to do my kind of jobs. I think the women's lib stuff is a lot of nonsense.

I have done about 400 - 500 porches since I have been in business. I don't know why Mrs. Floyd did not call me to this job. I owe Mr. Floyd about $200 which he loaned me for doctors' bills last year when my wife was sick. I'd have gladly build the porch for Mrs. Floyd.

For a job like this, I'd have sent out a two man team, one carpenter and a helper. Together it would take four days to put the porch up. It would depend on the weather. If there was no rain the cement would dry faster, so they could do a job in three days. But not less. One man working alone would take at least a week, more like 10 days. A man alone would have to use a dummy helper and it would be hard, tedious work. I would never send a woman on a job like this.

I'd say the labor fee varies pretty much, depending on whether the carpenter is union or non-union, how high off the ground, and what kind of work he's doing. For this job I would have charged $125/day for carpenter and helper, that's a usual rate. Some may be less, buth that's what I charge -- $93.00 for the carpenter, $32.00 for the helper.

The most expensive costs would be the materials. I understand this was to be a redwood porch, 5' x 8', with two railings, six risers (steps), double hand-rail and shed-type roof. Redwood is the most expensive kind of wood, so the materials' cost would be about $600 - $800. After inspecting this porch, I found that the grade of redwood used was industrial not top quality for residential use.

If there was no previous porch, a footing would have to be made for the base, unless the base sat on solid ground. These houses we live in (my wife and I live up the street) have back porches already, but they are about 4' x 6', not big enough to really sit on and enjoy. So there was some footing base. I inspected the porch at 1274 Harrison Street, N.W., twice: Once right after the accident and once right before this trial. Footing for a porch of this size must be 26" deep. The footings I measured were 23" deep. The posts in the footings were regulation 6 x 6, as the porch is 8' off the ground. The base frame had been properly set. Corner nails were set to intersect properly to distribute stress. However, the railings were not properly nailed to the corner posts, and could have given way under pressure. Maybe the woman tried to put the nails in.

I can't say how many people worked on this job, but from what I heard, they did a rush job and weren't experienced workmen. Besides, I've heard about Baldwin's operation. You know, the trade keeps track of its own. The last thing I heard was about a similar porch he put up in S.E. Same problem. It collapsed in a month.

FRED MASON, being first duly sworn, upon his oath deposes and says:

That he is a witness for the prosecution in the action of Georgia Floyd v. Fix-it Remodeling Home, Inc., and Sam Baldwin; that he has read the foregoing statement and knows the contents thereof; that the matters stated therein are true of his own knowledge, except as to those matters stated therein upon information and belief, and as to those matters he believes them to be true; and

FURTHER, that such contents were given freely and with his knowledge and consent in the presence and with the assistance of counsel.

/s/ Fred Mason

SUBSCRIBED AND SWORN to before me this _____ day of _____, 19 ____.

Notary Public

My commission expires:

Statement of
WITNESS FOR DEFENSE

Sam Baldwin
1717 Bladensburg Rd., N.E.
Washington, D.C.

I've been in business in D.C. about ten years. To my knowledge, this sort of thing has not happened before. Of course we advertise, who doesn't. We don't write the copy. We just give them an idea of what we want and they print it. So, it was a regular advertisement Mr. and Mrs. Floyd answered.

During the interview, I don't think I said anything about a master carpenter doing our work. As a matter of fact, we don't usually use a master carpenter because the cost is prohibitive. Many of our customers can not afford master carpenter rates, but they can afford rates charged by very good, qualified carpenters. So, that's who we usually use. Besides, everything between me and the Floyds is in the contract.

On this job we were able to get a master carpenter, Shelly Smith. She started the job but had to leave it after two days. She's pregnant and her doctor told her she couldn't work any longer, and not to finish the job. When she left, only the flooring, railing and roof were left to be put on. So I hired this other carpenter -- Lawrence Wansley was his name, to finish up. I offered him 1/2 of the same deal I offered the woman -- $150 for the job.

When Wansley called me two days later and said that he was finished, I told him "thanks" and paid him his money. That woman recommended him and I was stuck, so I hired him.

Like I said, I was lucky to get that woman in the first place. I've had jobs backed up for months because I can't get the quality help to do the job. This job wasn't started for a few months because I couldn't get a good carpenter to do the job.

I run an honest business, a little low on the finances right now, but honest. I even changed the name of the business and the phone number a couple of times to see if I could get things going. This econo-

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my is really hitting me hard.

As for the contract, it says we'll do the work, and what the porch is supposed to look like. Well, we performed the contract. I couldn't say when we were going to begin definitely because of all the other jobs the company had. One little delay and the whole schedule is off. That's what happened here.

Now this business about that not being a good porch is nonsense. I inspected it myself when the job was done. Its sturdy and fine quality materials were used. I've got the bills to prove it. The materials cost me $400.

That kid broke the railing. Any railing would have broken, as hard as he hit it.

SAM BALDWIN, being first duly sworn, upon his oath deposes and says:

That he is a witness for Fix It Home Remodeling in the action of Georgia Floyd v. Fix It Home Remodeling; that he has read the foregoing statement and knows the contents thereof; that the matters stated therein are true of his own knowledge, except as to those matters stated therein upon information and belief, and as to those matters he believes them to be true; and

FURTHER, that such contents were given freely and with his knowledge and consent in the presence and with the assistance of counsel.

_____

/s/ Sam Baldwin

SUBSCRIBED AND SWORN to before me this _____ day of _____, 19_____.

_____

Notary Public

My commission expires:

Statement of
WITNESS FOR DEFENSE

Lawrence Warsley
1414 Woodstock Place, N.E.

I've been a carpenter 15 years. I do not have a union master rating because I never bothered to take the test.

I build real good cabinets and I've made a few porches. I've worked for myself most of these 15 years.

I've known Shelly Smith (the woman carpenter) for about 5 years. She and I worked a construction even for one of Baldwin's competitors then.

I was real pleased to get the call. I had been out of work for quite a while and that $150 came in awfully handy. It was peanuts compared to what I'm used to making and Baldwin's known to be cheap, but bills are bills.

I worked hard and got the job done in two days. Shelly had done a good job putting in the frame and all so there wasn't a whole lot for me to do. I laid the floor and set the roof and railing. Then I was done.

About what that lady said about me drinking, I don't drink on the job. I was arrested once in 1965 for drunkeness but that was a mistake.

LAWRENCE WARSLEY, being first duly sworn, upon his oath deposes and says:

That he is a witness for the defense in the action of Georgia Floyd (or Harrison Floyd) v. Fix-it Remodeling Home, Inc. and Sam Baldwin; that he has read the foregoing statement and knows the contents thereof; that the matters stated therein are true of his knowledge, except as to those matters stated therein upon information and belief, and as to those matters he believes them to be true; and

FURTHER, that such contents were given freely and with his knowledge and consent in the presence and with the assistance of counsel.

_____
/s/ Lawrence Warsley

SUBSCRIBED AND SWORN TO before me this ____day of _____, 19___.

_____Notary Public

My Commission expires :

Statement of
WITNESS FOR DEFENSE

Mrs. Myrna Clark (or Mr. Morton Clark)
Neighbor

I've lived next to the Floyds, oh I guess, 20 years. Our families were the first in this block. Georgia and I have been good friends until recently, that is the last 4 or 5 years. We don't talk since Nelson broke my back door window.

Those grandchildren of hers are a real nuisance. They use my back yard as a short-cut to the street by hopping the fences. They yell and scream and make the dog bark. In the spring they trample my beautiful flowers. Especially that Nelson, he should be locked up as a juvenile deliquent.

You'd think Nelson and that Phil would have sense enough not to horseplay on that porch. Georgia had it built so she and Floyd could sit out on nice days not for those boys to fight on. My how they tussled. Back and forth. It's a wonder the whole thing didn't come down instead of just the railing. They were certainly pushing and slamming each other enough.

Until then, I thought that porch was strong enough to hold any thing, but I guess not two teen-aged boys. It certainly looked sturdy enough to me. Ruffians are just too careless about other people's property.

MRS. MYRNA CLARK (OR MR. MORTON CLARK), being first duly sworn, upon her oath deposes and says:

That she is a witness for the District of Columbia in the action of Georgia Floys (or Harrison Floyd) v. Tim-It Home Remodeling, Inc and Same Baldwin; that she has read the foregoing statement and knows the contents thereof; that the matters stated therein are true of her own knowledge, except as to those matters stated therein upon information and belief, and as to those matters she belives them to be true; and

FURTHER, that such contents were given freely and with her knowledge and consent in the presence and with the assistance of counsel.

Mrs. Myrna Clark
/s/ Mrs. Myrna Clark or Morton Clark

SUBSCRIBED AND SWORN to me before this 9th day of Apr
_____, 1975.

L Cameron
Notary Public

My commission expires:
May 2, 1975 14

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1979 MOCK TRIAL COMPETITION

SIMPLIFIED RULES OF EVIDENCE

In American trials, elaborate rules are used to regulate the admission of proof (i.e., oral or physical evidence). These rules are designed to ensure that both parties receive a fair hearing and to exclude any evidence deemed irrelevant, incompetent, untrustworthy, or unduly prejudicial. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge. The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial.

Formal rules of evidence are quite complicated and differ depending on the court where the trial occurs. For purposes of this mock trial competition, the rules of evidence have been modified and simplified below.

A. Witness Examination

1. Direct examination (attorneys call and question Witnesses)

   a. Form of questions: Witnesses may not be asked leading questions by the attorney who calls them. A leading question is one that suggests to the witness the answer desired by the examiner, and often suggests a "yes" or "no" answer. Direct questions generally are phrased to evoke a narrative answer.

      Example of a direct question: "Mr. Bryant, when did you first meet Angela?"

      Example of a leading question: "Mr. Hayes, isn't it true that you dislike Darryl Bryant?"

b. Scope of witness examination: (limited by rules of evidence explained in Part B. 3.).

c. Character: For mock trial purposes, evidence about the character of a party may not be introduced unless the person's character is an issue in the case. For example, whether one spouse has been unfaithful to another is a relevant issue in a civil trial for divorce, but is not an issue in a criminal trial for larceny. Similarly, a person's violent temper may be relevant in a criminal trial for assault, but is not an issue in a civil trial for breach of contract.

d. Refreshing Recollection: If a witness is unable to recall a statement made in the affidavit, or if the witness contradicts the affidavit, the attorney on direct may seek to introduce that portion of the affidavit that will help the witness to remember. (See Part B. 4. on introduction of evidence).

2. Cross-examination (questioning of the other side's witnesses)

a. Form of questions: An attorney may ask leading questions when cross-examining the opponent's witnesses. Questions tending to evoke a narrative answer should be avoided.

Example of a leading question: "Mrs. Bryant, didn't you consider marrying George Hayes?"

b. Scope of witness examination: Attorneys may only ask questions that relate to matters brought out by the other side on direct examination, or to matters relating

to the credibility of the witness. This includes facts and statements made by the witness for the opposing party (as well as expert opinions rendered under the rules set forth in Part B.2.) Note that many judges allow a broad interpretation of this rule.

Example: If the plaintiff in a car accident case never mentions damages to the car, then the defense cannot ask questions on cross-examination about the repair costs.

c. Impeachment: On cross-examination, the attorney may want to show the court that the witness should not be believed. This is called impeaching the witness. It may be done by asking questions about prior conduct that makes the witness' credibility (truth-telling ability) doubtful. Other times, it may be done by asking about evidence of certain types of criminal convictions. Impeachment may also be done by introducing the witness' affidavit, and asking the witness whether he or she has contradicted something which was stated in the affidavit.

Example (Prior Conduct): "Is it true that you often hit children when they cry too much?"

Example (Past Conviction): "Is it true that you were convicted of armed robbery?"

(NOTE: These types of questions may only be asked when the questioning attorney has information that indicates that the conduct actually happened.)

3. Re-direct examination

If the credibility or reputation for truthfulness of the witness has been attacked on cross

examination, the attorney whose witness has been damaged may wish to ask several more questions. These questions should be limited to the damage the attorney thinks has been done and should be phrased so as to try to "save" the witness' truth-telling image in the eyes of the court. Re-direct examination is usually limited to issues raised by the attorney on cross-examination.

B. Additional Rules of Evidence

1. Hearsay

Any evidence of a statement made by someone who is not present in the court which is offered to prove the truth of a fact, a piece of evidence or any witness' testimony is hearsay and not permitted.

Example: Jessica Hayes says, "I heard that Darryl Bryant has a criminal record."

Though hearsay is not usually allowed at a trial, a judge may sometimes allow it if:

a. it was said by a party in the case and contains evidence which goes against their side (e.g., in a murder case, the defendant told someone he committed the murder). This is sometimes called the "Admission against Interest" Exception; or

b. a person's state of mind is an important part of the case and the hearsay consists of evidence of what someone said which described that person's state of mind (sometimes called "State of Mind" Exception).

2. Witness Opinions

As a general rule, witnesses may not give opinions. Certain witnesses who have special

knowledge or qualifications may be qualified as "experts." An expert must be qualified by the attorney for the party for which the expert is testifying; this means that before an expert can be asked an expert opinion, the questioning attorney must bring out the expert's qualifications and experience.

All witnesses may give opinions on what they saw and heard at a given time, if such opinions are relevant to the facts in issue and helpful in explaining their story.

3. Lack of Personal Knowledge: A witness may not testify to any matter of which the witness has no personal knowledge.

   Example: If Jessica Hayes has never seen Angela Bryant with the baby, Jessica would not be able to say, "Angela is a terrible mother."

4. Relevance of Evidence

Generally, only relevant testimony and evidence may be presented. This means that the only physical evidence and testimony allowed is that which tends to make a fact which is important to the case more or less probable than the fact would be without the evidence. However, if the relevant evidence is unfairly prejudicial, may confuse the issues, or is a waste of time, it may be excluded by the court. This may include testimony, pieces of evidence and demonstrations that have no direct bearing on the issues of the case, or have nothing to do with making the issues clearer.

Example: The defense asks Mrs. Hayes on cross-examination, "How old are you?" (This question is permitted only if her age is relevant to the case.)

5. Introduction of physical evidence

There is a special procedure for introducing physical evidence during a trial. The physical evidence must be relevant to the case and the attorney must be prepared to defend its use on that basis. Below are the basic steps to use when introducing a physical object or document into evidence in a court.

a. "Your honor, I ask that this letter be marked for identification as Petitioner's Exhibit A." (Show letter and hand to bailiff for marking.)

b. (Show letter to opposing counsel, who may make an objection to the offering at this time.)

c. (Show letter to witness.) "Mr. King, do you recognize this document which is marked Petitioner's Exhibit A for identification?" (The witness explains what it is.)

d. "Your honor, I offer this letter for admission into evidence as Petitioner's Exhibit A, and ask the court to so admit it."

e. Get ruling from court on admission and proceed to use the letter or you can ask the witness a series of questions about the letter, and then ask the court to admit it.

C. Objections

An attorney can object any time the opposing attorneys have violated the rules of evidence. The attorney wishing to object should stand up and do so at the time of the violation. When an objection is made, the judge will ask the reason for it. Then the judge will turn to the attorney who asked

the question, and that attorney usually will have a chance to explain why the objection should not be accepted ("sustained") by the judge. The judge will then decide whether a question or answer must be discarded, because it has violated a rule of evidence ("objection sustained"), or whether to allow the question or answer to remain on the trial record ("objection overruled").

Following are standard objections:

1. Irrelevant evidence: "I object, your honor. This testimony is irrelevant to the facts of this case."

2. Leading questions: "Objection. Counsel is leading the witness." (Remember, this is only objectionable when done on direct examination.)

3. Improper character testimony:

   a. "Objection. The witness' character or reputation has not been put in issue."

   b. "Objection. Only the witness' reputation/character for truthfulness is at issue here."

4. Beyond the scope of direct examination: "Objection. Counsel is asking the witness about matters that did not come up in direct examination."

5. Hearsay: "Objection. Counsel's question/ the witness' answer is based on hearsay." (If the witness makes a hearsay statement, the attorney should also say, "and I ask that the statement be stricken from the record.")

6. Opinion: "Objection. Counsel is asking the witness to give an opinion."

7. Lack of personal knowledge: "Objection. The witness has no personal knowledge that would enable him to answer this question."

FIX-IT HOME REMODELING COMPANY CONTRACT

April 22, 1974
DATE

The Fix-It Home Remodeling Company agrees for the sum of $2500 (two thousand, five hundred dollars) to construct a porch at the rear of the premises at 1274 Harrison Street, N.W., owned by Mr. & Mrs. Harrison Floyd. Said porch shall be constructed of redwood and shall be five (5) feet in width and eight (8) feet in length, and shall stand eight (8) feet off the ground. Said porch shall be constructed on the rear of the above named premises.

TERMS

Consideration from Harrison Floyd and Georgia Floyd shall be the sum of $630.00 (six hundred eighty dollars) as deposit immediately. The balance of $1,820.00 (eighteen hundred twenty dollars) shall be paid as follows:

$400 upon the commencement of construction

$1420 upon completion of construction

Upon the commencement of construction any payment two days in default shall render the entire balance due and owing.

In return for this consideration, Fix-It Home Remodeling agrees to furnish quality material, experienced workmen and quality service.

This writing constitutes the full agreement and understanding of the parties signed herein.

_____
Floyd

_____
Baldwin

_____
Floyd

April 22, 1974
Date

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Stipulated to by Both Parties

FOSTER BROTHERS LUMBER SUPPLIES
1714 - 12th Street, N.E.
Washington, D.C. 20010

To:
Fix-It Home Remodeling Co.

Deliver To:
1274 Harrison St., N.W.
Washington, D.C.

LUMBER

4	6 x 6, 12' uprights	$70.00
4	2 x 8, 8' joists	25.00
4	4 x 4, 12' uprights	40.00
2	2 x 10, 10' stringers (supports)	19.00
4	2 x 8, 10' joists (roof)	25.00
20	1 x 4, 8' decking	50.00
	Plywood for roof	13.00
4	Bags Concrete	10.00
5	3' Steps	15.00
3	Bundles of roof shingles	30.00
	Miscellaneous Hardware	30.00
	Shed Roof	40.00

Sub total	$367.00
Tax	14.60
5% delivery	18.40
Total	$400.00

PAYMENT DUE UPON RECEIPT

Stipulated to by Both Parties at Pretrial

DISTRICT OF COLUMBIA HOSPITAL

EMERGENCY ROOM

INVOICE

Date: Oct. 1, 1974

For: Nelson Grant
1274 Harrison Street, N.W.
Washington, D.C.

SERVICES RENDERED	CHARGES	PAID	BALANCE
X-ray left tibia dorsal, lateral	$18.00		
left ulna	16.00		
cervical spine	18.00		
P.A. chest, lateral	32.00		
Orthopedic support brace	20.00		
Surgical left temple 10 stitches	10.00		
Richt forearm 8 stitches	10.00		
Sub total	$124.00		
Professional Fees	16.00		
Total	$140.00		

PLEASE REMIT UPON RECEIPT OF THIS INVOICE

Stipulated to By Both Parties at Pretrial

DISTRICT OF COLUMBIA HOSPITAL
BILL

DATE: Nov. 1, 1974

For: Nelson Grant
1274 Harrison Street, N.W.
Washington, D.C.

DATE	SERVICES RENDERED	CHARGES
9/9/74	Surgical fitting - cast left foot to hip	50.00
9/9/74	Anesthia	100.00
9/9 thru 10/5/74	Pharmaceutical	70.00
9/9/74 thru 10/1/74	Room and Board	1,080.00
	Doctors Fees	200.00
	TOTAL	$1,500.00

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QUICK

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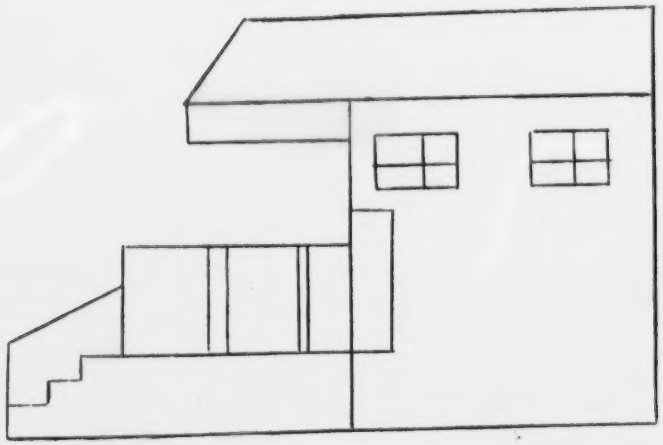
DELUX

PORCHES



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DISTRICT MOTOR CO., Inc. v. RODILL.

No. 1190.

Municipal Court of Appeals for the District of Columbia.

Argued [illegible], 1932.

Decided May 7, 1932.

Action by Marcelino Rodill, for use of himself and Arthur Bodill, against District Motor Co., Inc., in tort for alleged fraud of defendant in misrepresenting that automobile sold to plaintiff was new, or in the alternative for breach of warranty. The Municipal Court for the District of Columbia, Civil Division entered judgment for plaintiff, and defendant appealed. The Municipal Court of Appeals, Cayton, C. J., held that allegations and proof that misrepresentations that car was new were made falsely and fraudulently with knowledge of falsity on part of representors, and that plaintiff relied upon such representations to his damage in making purchase, were sufficient as basis for recovery of exemplary damages.

Affirmed.

1. Evidence ⇐333(1)

In action to recover in tort for alleged fraud of defendant in misrepresenting that automobile sold to plaintiff was new, admission in evidence on issue whether automobile was in fact used or new of record of Department of Vehicles and Traffic which showed that automobile had been titled 8 months previously to defendant and that title issued to plaintiff was for used automobile was in accordance with statute relating to admission in evidence of records made in regular course of business, and was proper.

2. Evidence ⇐373(1)

In action to recover in tort for alleged fraud of defendant in misrepresenting that automobile sold to plaintiff was new, wherein record of vehicle inspector purporting to show mileage of automobile when it was inspected while in hands of defendant was sought to be introduced, custodian of records who had neither observed speedometer or made entry was competent to prove authenticity of record. Rules of Municipal Court for District of Columbia, rule 44; 28 U.S.C.A. § 1732.

55 A.2d—31½

3. Evidence ⇐333(1)

In action to recover in tort for alleged fraud of defendant in misrepresenting that automobile sold to plaintiff was new, admission in evidence of duly authenticated record of vehicle inspector purporting to show mileage of automobile when same was inspected while in hands of defendant was proper. 28 U.S.C.A. § 1732.

4. Fraud ⇐58(2)
Sales ⇐441(3)

In action to recover in tort for alleged fraud of defendant in misrepresenting that automobile sold to plaintiff was new, or in the alternative to recover for breach of warranty, evidence justified finding that automobile sold to plaintiff was not in fact new.

5. Fraud ⇐61

A case founded on fraud or deceit may support an award of exemplary damages, and there need not be personal hatred or ill will by defendant toward plaintiff.

6. Damages ⇐89(1)
Fraud ⇐61

In cases involving fraud and deceit, wantonness, oppressiveness, maliciousness, recklessness, gross fraud, gross negligence, a spirit of mischief, or criminal indifference to civil obligations, afford sufficient legal malice for award of punitive damages.

7. Damages ⇐208(8)

Once it has been determined that there is legal basis for award of punitive damages, whether such damages shall be awarded is matter within province of jury or trier of facts.

8. Fraud ⇐47

Where plaintiff sought to recover in tort for alleged fraud of defendant in misrepresenting that automobile sold to plaintiff was new, allegations that representations were falsely and fraudulently made knowing them to be false, that mileage indicator on automobile was turned back for purpose of inducing purchase, and that misrepresentations were relied upon to plaintiff's damage, were sufficient to authorize recovery of punitive damages.

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9. Fraud ⇐58(7)

In action to recover in tort for alleged fraud of defendant in misrepresenting that automobile sold to plaintiff was new, wherein it appeared that speedometer had been removed and different speedometer substituted, evidence sustained finding that agents of defendant knew that automobile was not new at time representations were made.

10. Fraud ⇐17, 21

A buyer of an automobile is entitled to rely on speedometer reading to determine factor of mileage and use unless he has been put on notice, and dealer is under duty to disclose his knowledge relating to falsity of what speedometer shows, notwithstanding possible trade custom among automobile dealers to replace speedometers.

11. Damages ⇐92

Punitive damages may be awarded against principal for acts of its agents where principal has participated in wrongful acts, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed, and such rule is equally applicable to corporations and their agents.

12. Fraud ⇐58(7)

In action to recover in tort for alleged fraud of defendant corporation, through its agents, in misrepresenting that automobile sold to plaintiff was new, evidence was sufficient to authorize finding that president and treasurer of defendant corporation knew that speedometer of automobile at time of purchase by plaintiff did not indicate actual mileage.

13. Corporations ⇐423

Where agents of defendant corporation misrepresented that automobile sold to plaintiffs was new, and president and treasurer of defendant corporation knew that speedometer at time of sale did not indicate actual mileage of automobile and that automobile was not new, corporation was liable in punitive damages for wrong of its agents.

14. Infants ⇐74

Where father brought action for use of himself and his son to recover in tort for alleged fraud of corporation in misrepresenting that automobile sold to son was new, when son had become of age when action was brought, son must be included as party plaintiff in his own right in order that defendant be protected by judgment awarding damages. Rules of Municipal Court for District of Columbia, rule 17(a).

Arthur J. Hilland, Washington, D. C., for appellant.

Edmund L. Browning, Jr., Washington, D. C., for appellee.

Before CAYTON, Chief Judge, and HOOD and QUINN, Associate Judges.

CAYTON, Chief Judge.

Marcelino Rodill bought a 1949 model Hudson convertible from defendant corporation in March, 1950, for the use of his son, Arthur Rodill, who at that time was a minor. The Rodills specified that the car must be "new" although they understood that they were buying a 1949 model and not a 1950. In the contract of sale the automobile was described as a "new" car. At the time of purchase the automobile's speedometer registered 50 miles.

When Mr. Rodill registered the automobile with the Director of Motor Vehicles he was issued a "used" car title. Inquiry was then made of the defendant and resulted in a letter signed by its president, addressed "To whom It May Concern" in which it was stated that the automobile "was purchased from us new." It was admitted however that defendant had actually taken title to the car eight months before it was sold to Marcelino Rodill.

An action was brought by Marcelino Rodill "for the use of himself and Arthur Rodill," seeking to recover in tort for fraud and misrepresentation and in the alternative for breach of warranty. The trial judge sitting without a jury found for the plaintiff and awarded $200 for compensatory and $400 for exemplary damages. Defendant appeals.

1. Defendant contends it was error to admit in evidence the record of the Department of Vehicles and Traffic which showed that the automobile had first been titled to

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the defendant. Counsel for defendant objected to this evidence on the ground that the record was not probative of whether or not the automobile was "new" or "used" because the Department of Vehicles and Traffic had a policy of issuing a "new" car title only when the title application is accompanied by a "certificate of origin" from the manufacturer without regard to the length of time the automobile had been in use. Objection was also made to the introduction of a record of the Vehicle Inspector of the District of Columbia purporting to show the mileage of the automobile when it was inspected while in the hands of defendant, on the ground that it was incompetent, hearsay, and authenticated not by one who took the speedometer reading and recorded it, but by someone else.

[1] With regard to the first of these records, we need not decide the probative value of the policy of the Department of Vehicles and Traffic with regard to the issuance of automobile titles. But the dates when the automobile was first in defendant's hands and was first titled were certainly relevant and material to the issue of newness and the record was admissible to show those facts under the Federal Shop Book Rule.[1] In addition, there is nothing to indicate that the finding of the trial court was based on the policy of the Department of Vehicles, and there was other evidence from which the issue of "newness" could have been determined. Hence the ruling was not erroneous.

[2] The record of the Inspector of Vehicles contained entries made by several District of Columbia employees at the time the vehicle was inspected. One of these was an entry showing that the speedometer indicated that the car had been driven 348 miles. Plaintiff sought to authenticate this record by a witness who had neither observed the speedometer nor made the entry; he was the custodian of the record. This witness was clearly competent to prove the record. Municipal Court Civil Rule 44.

[3] Nor do we think it can be said that the recordation of what was observed from a speedometer calls for an opinion which can only be given by him who saw it. It would be difficult to conceive of a matter less dependent on opinion than the numbers on a speedometer, or of a record which is more "* * * a product of routine procedure and whose accuracy is substantially guaranteed by the fact that the record is an automatic reflection of observations."[2] Under the Federal Shop Book Rule this record was properly received in evidence.[3]

[4] 2. Defendant next contends that the finding that the car was not new is contrary to the evidence and to law. The sole defense was that the automobile was in fact "new." Plaintiff and his son expressly asked for a new automobile and the one here involved was thus represented to them. There was competent evidence from which the trial court could have found that the automobile had been in defendant's hands some eight months before being sold to plaintiff and that about ten days after being acquired by defendant dealer the speedometer showed that the automobile had been driven 348 miles. There was also evidence tending to show that an automobile similar to the one sold plaintiff was being driven by defendant's president for one or two months after the time it was acquired by defendant. The witness who gave this testimony said that the car he saw defendant's president, Mr. Haller, driving bore D. C. dealer tags No. 463, when in fact the dealer's tag was numbered 364 on the car sold to plaintiff. Mr. Haller admitted that he drove the car "some", but was unable to recall to what extent. It was also admitted by the defendant that the original speedometer had been removed and replaced by another before the car was sold to plaintiff.

Defendant does not contend that whether or not the automobile was new was a question of law; it takes the position that the term "new" is relative, that the evidence did not prove that the automobile was not new and hence plaintiff did not sustain his

1. 28 U.S.C. § 1732 (Supp.1951).

2. New York Life Ins. Co. v. Taylor, 79 U.S.App.D.C. 66, 72, 147 F.2d [illegible]

3. See Moran v. Pittsburgh-Des Moines Steel Co., 8 Cir., 183 F.2d 407.

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burden of proof. But from the evidence as above outlined there can be no doubt that the trier of the facts was justified in finding that the automobile sold to plaintiff was not "new."

3. A more serious question arises from defendant's claim that it was error to include an award of punitive damages in the finding. Defendant contends that to justify such award the complaint must allege and the evidence must establish that the defendant "acted wantonly, or oppressively or with such malice which implies a spirit of mischief or criminal indifference to civil obligations."[4] We understand defendant's position, as revealed by counsel's brief and oral argument to be: (1) the award of the trial court was based on a finding of bare fraud and bare fraud is insufficient to support the award because the law requires that defendant must have acted maliciously, and this means actual malice in the sense that defendant bore ill will or hatred toward the plaintiff; (2) the allegations of the complaint were insufficient to support punitive damages; (3) in any event the evidence does not support a finding of fraud, because defendant's agents believed the car to be "new" in fact.

[5] We are satisfied that a case founded on fraud or deceit may support an award of exemplary damages. Greene v. Keithley, 8 Cir., 86 F.2d 238, and authorities there cited. As that decision points out, courts have used many expressions in describing the elements that must be present before punitive damages are proper; and the damages are colored by the character of the tort in connection with which the particular language was used. But we know of no case involving fraud as a basis for exemplary damages which holds that there must be personal hatred or ill will by the defendant toward the plaintiff.

Appellant relies on Minick v. Associates Inv. Co., 71 App.D.C. 367, 110 F.2d 267, 268. There it was alleged that the defendand had wilfully, wantonly and maliciously stopped payment of a check given in payment of an automobile repair job. The court held that this was the equivalent of saying that it had wilfully, wantonly and maliciously breached its contract to pay the charges. The decision held that no punitive damages would be allowed for breach of contract regardless of defendant's motive and that plaintiff was confined to interest as the only recovery for the breach in excess of its actual loss. The opinion also contained this statement: "Even in a tort case, except perhaps where the complaint sets out circumstances of extreme aggravation, punitive damages are not allowable." Supporting this last statement the opinion cited Ballard v. Spruill, 64 App.D.C. 60, 74 F.2d 464, 466, certiorari denied, 302 U.S. 764, 58 S.Ct. 477, 82 L.Ed. 594. There the same court had ruled that punitive damages were recoverable where the wrongful act complained of was "characterized by some such circumstances of aggravation as willfulness, wantonness, malice, oppression, brutality, insult, recklessness, gross negligence, or gross fraud on the part of the defendant." The latest decision on the subject in this jurisdiction is Chesapeake & Potomac Telephone Co. v. Clay, D.C.Cir., 194 F.2d 888, 891. There the plaintiff had charged that the telephone company had breached its contract to furnish reference service of telephone calls. He based his claim on both tort and breach of contract. The court held that it was material to determine whether the breach of contract was a tort because "punitive damages are not awarded for breach of contract unless it was tortious in character." The court pointed out that the evidence indicated good faith on the part of the defendant and that their negligence seemed to have been inadvertent and that, "It does not appear that they acted maliciously, wantonly, oppressively, or with a spirit of mischief or criminal indifference to civil obligations * * *." Therefore punitive damages were held improper.

[6] Thus we see that the law in this jurisdiction recognizes that any one of the following, characterized in Minick v. Associates Inv. Co., supra, as circumstances of extreme aggravation, constitutes a legal ba-

4. Citing Lake Shore & Michigan Southern Ry. Co. v. Prentice, 147 U.S. 101, 107, 13 S.Ct. 261, 37 L.Ed. 97.

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sis on which punitive damages may be awarded: wantonness, oppressiveness, maliciousness, recklessness, gross fraud, gross negligence, a spirit of mischief, or criminal indifference to civil obligations. In this connection we think it has been correctly said that, "* * * in cases of fraud and deceit punitive damages may be awarded where legal malice is present. * * * Moreover, by legal malice the courts have in mind *simply the accepted theory of the intentional doing of a wrongful act without just cause or excuse, and not the necessity for the showing of any spite or ill will*, or that the particular act was willfully or wantonly done." (Emphasis supplied.) Jones v. West Side Buick Auto Co., 231 Mo.App. 187, 93 S.W.2d 1083, 1088, quoted with approval in Rinehart v. Joe Simpkins, Inc., Mo.App., 240 S.W.2d 962, 968. Indeed it has been said that, "If the injury was inflicted through fraud, this alone affords grounds for exemplary damages * * * since in such a case the injury is necessarily malicious."[5] Hence the acts of fraud and deceit need not be malicious in the colloquial or dictionary sense: a plaintiff need not show personal grudge or spite but merely the intentional doing of a wrongful act without just cause or excuse. Furthermore, defendant's acts of deceit, set forth elsewhere in this opinion, particularly the deliberate switching of speedometers, were such as to justify a finding that the fraud practiced upon the Rodills was wilful, deliberate, and even gross in nature.[6]

[7] It should be borne in mind that once it is determined that there is a legal basis for punitive damages, whether or not such damages shall be awarded is within the peculiar province of the jury. 1 Sedgwick, Damages, § 347 et seq. (9th ed. 1920). Hence though such damages will not be awarded as a matter of course when one of the above elements are present they *may* be allowed when the trier of the facts (in this case the judge) feels that the wrong is of such a nature and degree that an example, by way of a deterrent and a warning, is justified in the public interest.

[8] We now consider the sufficiency of the complaint. It alleges that, "* * * the representations * * * that the car was new were made falsely and fraudulently * * * well-knowing that they were false, and that the said representations were made and the mileage indicator turned back for the purpose of inducing Plaintiff to purchase the said automobile, and that Plaintiff * * * believed and relied upon said misrepresentations to their damage. * *" The complaint demanded "* * * exemplary damages, for the fraudulent misrepresentation of defendant as heretofore averred. * * *" Since fraud provides a basis for the recovery of exemplary damages it follows that an allegation of fraud is sufficient on the issue of such damages.

[9, 10] As to the sufficiency of the evidence: Appellant argues that the evidence does not support a finding of fraud because its agents actually believed the car to be new. We think appellant overlooks the fact that the speedometer had been replaced before the sale to plaintiff and that at the time of the sale the substituted speedometer did not reflect the true mileage that the car had been driven. Neither of the Rodills was advised of this fact by defendant dealer. At the time of sale the speedometer as observed by the Rodills registered only 50 miles, but there was evidence from which the trial court could have found that the automobile had actually been driven many times that number of miles. It was important to the Rodills that the car be a new one and certainly the number of miles it had been driven was material to the question of newness. A buyer is entitled to rely on a speedometer reading to determine the all-important factor of mileage unless he has been put on notice, and the dealer is thereby under a duty to disclose his knowledge relating to the falsity of what the speedome-

5. 1 Sedgwick, Damages, § 367 (9th ed. 1920). This view is supported by Aladdin Mfg. Co. v. Mantle Lamp Co. of America, 7 Cir., 116 F.2d 708. See also Atkinson v. Dixie Greyhound Lines, 5 Cir., 143 F.2d 477, certiorari denied, 323 U.S. 758, 65 S.Ct. 92, 89 L.Ed. 607; and Scallas v. National Utility Service, 3 Cir., 120 F.2d 923.

6. See annotation, 105 A.L.R. 616 and cases there cited.

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ter shows. The act of defendant's agents was an act of deceit, calculated to destroy or conceal evidence highly significant to the Rodills on the question of the automobile's mileage, and hence its newness. It cannot be doubted that removal of the original speedometer and substitution of a new one had the effect intended: it destroyed or at any rate seriously interfered with the Rodills' freedom of decision in the matter.

Jones v. West Side Buick Auto Co., 231 Mo.App. 187, 93 S.W.2d 1083, is exactly in point. This language, 93 S.W.2d at page 1086, is especially pertinent: "Both reason and precedent tell us * * * that a representation with reference to the mileage of an automobile is a representation with reference to a material fact, and that it is none the less a representation of such a material character if made through the medium of turning back the speedometer * * *." Also exactly in point and reaching the same conclusion is the recent decision in Bell v. Graham, 105 Cal.App.2d 765, 234 P.2d 158.

There was some evidence on behalf of the defendant tending to indicate that there was a trade custom which permits the turning back or replacement of speedometers, but the same evidence also tended to indicate that when this is done the prospective purchaser is so informed. In any event the law cannot condone a trade custom having deceit as its purpose and which gives the dealer the unfair advantage of having significant information as to the age and previous use of an automobile, and withholding it from a purchaser.

[11] 4. Defendant argues that it is not liable in punitive damages for torts of its agents. But the law is that punitive damages may be awarded against the principal for acts of its agents where the principal participated in the wrongful acts, expressly or impliedly, by his conduct authorizing it or approving it, either before or after it was committed. Lake Shore & Michigan Southern Ry. Co. v. Prentice, 147 U.S. 101, 13 S.Ct. 261, 37 L.Ed. 97. The law is no different when the principal is a corporation. An officer of a corporation "* * * actually wielding the whole executive power of the corporation, may well be treated as so far representing the corporation and identified with it that any wanton, malicious or oppressive intent of his, in doing wrongful acts in behalf of the corporation to the injury of others, may be treated as the intent of the corporation itself". Id. 147 U.S. at 114, 13 S.Ct. at page 265.

[12, 13] There was evidence from which the trial court could have found that both the president and treasurer of defendant corporation knew that the speedometer at the time of the sale to the Rodills did not indicate the actual mileage of the automobile. Moreover, defendant's president admitted knowledge of a switch in speedometers of other automobiles being put up for sale on other occasions. It is thus apparent that the evidence was sufficient to bring the case within the test quoted above.

[14] 5. Finally, it is argued that the action was not brought in the name of the real party in interest as required by Municipal Court Civil Rule 17(a) because the tort, if any, was against Arthur Rodill and he is the one entitled to relief therefor. It is contended that the designation of Marcelino Rodill "for the use of himself and Arthur Rodill" is insufficient. Arthur had become of age when the action was brought.

During the course of the trial, plaintiff's counsel indicated that he was dissatisfied with the designation of the Rodills and offered to amend to include Arthur as a party plaintiff in his own right. This offer was later renewed although it was never made in the form of a motion. At the argument of the motion for new trial counsel for defense objected to an amendment to include Arthur Rodill as a party on the ground that the trial court had lost jurisdiction. The trial judge directed defense counsel to submit a memorandum on the law involved but so far as the record shows this was never done. In order to remove any possible doubt that defendant is protected by the judgment, Arthur Rodill should be added as a party plaintiff when the case is returned to the trial court.

Affirmed.

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Jackson, D.C.Cir., 276 F.2d 501, 501, No. 15,763, decided March 10, 1960, where it was said that the primary obligation of the father is to be measured by the "welfare and needs of the children, in the past as well as the present and the future, * * * and having in mind also the situation of the parents and any other relevant factor."

I would require the father to meet and answer plaintiff's claim in a trial on the merits.

Leon CHERNER, Henry Gertler and Samuel Mamsh, Co-Partners, t/a Cherner-Shirlington Motor Company, Appellants,

v.

John R. HALL, Appellee.

No. 2540.

Municipal Court of Appeals for the District of Columbia.

Argued March 28, 1960.

Decided June 7, 1960.

Conditional automobile seller's action to recover deficiency arising after conditionally sold vehicle had been repossessed and resold. The Municipal Court for the District of Columbia, Civil Division, Dewey S. Hyde, J., entered judgment for conditional buyer who counterclaimed for damages for fraud and conditional seller prevailed. The Municipal Court of Appeals, Rover, C. J., held that there was no evidence to show that conditional buyer relied upon alleged misrepresentation that automobile purchased was a new vehicle.

Reversed with instructions to grant new trial.

1. Fraud ⊂=53(4)

In conditional automobile seller's action against conditional buyer for deficiency arising after conditionally sold automobile was repossessed and resold, where buyer counterclaimed for damages because of alleged fraudulent representation that automobile he purchased was new, evidence failed to disclose that conditional buyer relied on alleged misrepresentation that automobile was new rather than used.

2. Fraud ⊂=58(2, 4)

Where conditional buyer of automobile sought to recover damages for alleged fraudulent representation that vehicle was new rather than used, burden was on buyer to prove elements of fraud by clear and convincing evidence, and he was required to prove that representation was made, that representation was false, that representation was material, and also that he relied upon such representation.

Charles B. Sullivan, Jr., Washington, D. C., for appellants.

Bernard W. Kemp, Washington, D. C., for appellee.

Before ROVER, Chief Judge, and HOOD and QUINN, Associate Judges.

ROVER, Chief Judge.

Appellants in their complaint alleged that they sold an automobile to appellee under a conditional sales contract providing for monthly payments; that the latter had defaulted in these payments, whereupon the vehicle was repossessed and resold resulting in a net deficiency of $1,693.38 for which they asked judgment plus attorney's fees as provided in the contract. Appellee admitted the sale and repossession but counterclaimed alleging fraud in the transaction in that it had been represented to him that the car was new; that after the sale had been consummated it developed

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that the car delivered to him was a used automobile. He claimed that as a result of this fraudulent misrepresentation he had been damaged and claimed the sum of $1,734.82 as compensatory damages and $1,265.18 punitive damages.

After a trial the court found that appellants had been guilty of fraud in the transaction, made a finding in favor of appellee on appellants' claim because of the fraud, and refused to allow compensatory damages but made a finding of $400 punitive damages. The principal question on appeal is whether the court was justified in finding that the sale was fraudulent.

[1,2] The burden was on the appellee to prove the elements of fraud by clear and convincing evidence. He was required to prove not only that the representation was made that the car was new, that the representation was false in that it was not new but used, and that the misrepresentation was material, but he was also required to prove that he relied on such misrepresentation.

> "It is essential to actionable fraud that the party to whom the misrepresentation is made must not only be warranted in accepting it, *but must also actually accept it and rely upon it.*"[1] (Emphasis supplied.)

The case is entirely devoid of any evidence that the appellee relied upon the alleged misrepresentation. The court may have been justified in finding that a false representation had been made and that it was material, but appellee who was not present at the trial neither testified nor offered any evidence that he relied upon it, and there is nothing in appellants' evidence that would justify the court in finding that appellee did rely upon the misrepresentation. For this reason we are required to reverse.

Reversed with instructions to grant a new trial.

1. Chapman Realty Co. v. Crump, D.C.Mun. App., 80 A.2d 615, 616. See also Rosenberg v. Howle, D.C.Mun.App., 76 A.2d 709.

John A. PALMER, Appellant,

v.

UNITED STATES, Appellee.

No. 2528.

Municipal Court of Appeals for the District of Columbia.

Submitted March 21, 1960.

Decided June 7, 1960.

Defendant was convicted of larceny. The Municipal Court of the District of Columbia, Criminal Division, Thomas C. Scalley, J., rendered judgment and defendant appealed. The Municipal Court of Appeals, Hood, A. J., held that judge's comment, when informed by jury foreman that verdict had not been reached and before excusing jury for lunch, that the case was not a difficult one, was not tantamount to expressing judgment that defendant was guilty and did not cross constitutional line by invading province of jury, and, as it was not shown to have had any substantial influence on verdict, it could not constitute prejudicial error.

Affirmed.

Criminal Law ⇐865(1), 1174(1)

Judge's comment, when informed by jury foreman that verdict had not been reached, before excusing jury for lunch, that the case was not a difficult one, was not tantamount to expressing judgment that defendant was guilty and did not cross constitutional line by invading province of jury, and, as it was not shown to have had any substantial influence on verdict, it could not constitute prejudicial error.

Samuel J. Ochipinti, Washington, D. C., for appellant.

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